Supreme Court, U.S.
FILED

97 1796 MAY 5 1998

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

RICHARD EPSTEIN,

Petitioner

vs.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, dba KAISER PERMANENTE MEDICAL GROUP a business entity whose form is unknown; KAISER FOUNDATION HOSPITALS, a non profit corporation, KAISER FOUNDATION HEALTH PLAN, INC., a Corporation, SHARON BUTTERFIELD, an individual; PAM CARTER, an individual; CATHY COUSINEAU, an individual, and RAMAH BALIBAR, an individual

Respondents

On a Writ of Certiorari to
The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF JEROME ZAMOS
Jerome Zamos Cal.St.Bar 36246
Attorneys for Petitioner
5850 Canoga Avenue, Suite 400
Woodland Hills, California 91367
[818] 348-7151

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX: (213) 747-5843

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED

The instant PETITION raises the following questions of law which require review by this Court:

I.

Does a federal court exceed its jurisdiction under Article III of the Constitution, and abuse its discretion, when it retains jurisdiction over an action from which all federal issues have been removed pursuant to an amendment made as a matter of right under Rule 15(a) of the Federal Rules of Civil Procedure ?

II.

Are federal courts obligated under the 1988 amendment to 28 U.S.C. § 1447(c) to remand all cases removed from state courts, if all grounds for jurisdiction under Article III are removed prior to the entry of any orders in the case in controversy ?
2amos

III.

Does an overly liberal resort to summary judgment procedures under Rule 56 of the Federal Rules of Civil Procedure in employment discrimination cases violate a litigant's rights to trial by jury under the Seventh Amendment ?

IV.

Is there a congressionally legislated policy which favors adjudication of employment discrimination claims in state courts?

V.

Was an amended notice of appeal under Rule 4(a)(4) of the Federal Rules of Appellate Procedure required in order to attack the jurisdiction of the Court in awarding attorney fees under the provisions of state law against either a party, or his non party attorney in the absence of compliance with either Rule 11 or 54(d)(2) of the Federal Rules of Civil Procedure?

TOPICAL INDEX

QUESTIONS PRESENTED i

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

THE CONSTITUTION OF THE UNITED STATES OF AMERICA 3

THE UNITED STATES CODE 3

THE FEDERAL RULES OF APPELLATE PROCEDURE 3

CALIFORNIA GOVERNMENT CODE SECTIONS 3

ISSUES ADDRESSED IN THIS PETITION . . . 4

PETITIONER'S STATEMENT OF THE CASE . 5

PRIMARY ISSUE RAISED BY PETITION 7

REASONS FOR GRANTING WRIT 8

FACTUAL BACKGROUND OF APPEAL 8

PROCEDURAL HISTORY OF
PETITIONER'S CLAIM 10

PETITIONER'S LEGAL ARGUMENTS 13

I. IN THE ABSENCE OF DIVERSITY A FEDERAL COURT DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO FORCE A STATE COURT LITIGANT TO ADJUDICATE CLAIMS IN A FEDERAL COURT WHICH ARISE EXCLUSIVELY UNDER THE LAWS OF A STATE 13

II. EVEN IF THE DISTRICT COURT INITIALLY HAD JURISDICTION OVER PETITIONER'S CLAIMS, ITS RETENTION OF JURISDICTION WAS AN ABUSE OF DISCRETION UNDER THE COURT'S REASONING IN CARNEGIE-MELLON UNIVERSITY V. COHILL 484 U.S. 343, 108 S.Ct. 614 (1988) . 15

III. THE 1988 AMENDMENT TO 28 U.S.C. § 1447(c) EXPRESSED A CONGRESSIONAL MANDATE TO RETURN CASES OVER WHICH FEDERAL COURTS LACKED SUBJECT MATTER JURISDICTION TO THE STATE COURTS IN WHICH THEY WERE ORIGINALLY FILED 20

IV. CONGRESS HAS EXPRESSED A PREFERENCE FOR THE ADJUDICATION OF EMPLOYMENT DISCRIMINATION CASES UNDER STATE MANDATED PROCEDURES 22

V. UNDER RULE 15(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE A LITIGANT HAS AN ABSOLUTE RIGHT TO ELIMINATE ANY CLAIMS OR CAUSES OF ACTION WHICH HE OR SHE HAS DECIDED NOT TO PURSUE 24

VI. THIS COURT SHOULD NOT ALLOW MOTIONS UNDER RULE 56 TO BECOME A SUBSTITUTE FOR JURY TRIALS IN EMPLOYMENT LITIGATION 26

VII. THE DISTRICT COURT DID NOT HAVE THE JURISDICTION TO MAKE A POST JUDGMENT AWARD OF ATTORNEY FEES 28

CONCLUSION 30

INDEX TO APPENDIX

OPINION OF THE NINTH CIRCUIT COURT OF APPEAL APX-1

FIRST AMENDED COMPLAINT APX-7

THE ORDER DENYING REMAND APX-17

ORDER GRANTING IN PART, DENYING IN PART DEFENDANTS' MOTION TO DISMISS FILED MAR. 26, 1996 & ENTERED MAR. 27, 1996 . . . . . APX-19

JUDGMENT ON RESPONDENTS' MOTION TO DISMISS FILED ON APR. 4, 1996 & ENTERED ON APR. 8, 1996 . . . . . APX-21

SUMMARY JUDGMENT FILED SEPT. 25, 1996 & ENTERED SEPT. 26. 1996 . . . . . APX-23

NOTICE OF APPEAL FROM JUDGMENTS AND ALL OTHER ORDERS ENTERED IN THIS ACTION INCLUDING THE COURT'S IMPROPER RETENTION OF JURISDICTION FOLLOWING MOTION TO REMAND [FILED OCTOBER 15, 1996] . . APX-25

ORDER GRANTING SCPMG'S
MOTION FOR ATTORNEY FEES
- FIRST ORDER FILED
NOV. 18, 1996
ENTERED NOV. 19, 1996 . . . . . APX-27

ORDER GRANTING SCPMG'S
MOTION FOR ATTORNEY FEES
- SECOND ORDER FILED
NOV. 26, 1996
ENTERED NOV. 27, 1996 . . . . . APX-29

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED IN PETITION . . APX-35

CONSTITUTION APX-35

ARTICLE III §§ 1 & 2 OF THE
CONSTITUTION OF THE UNITED
STATES OF AMERICA APX-35

The Seventh Amendment APX-36

PROVISIONS OF THE UNITED
STATES CODE APX-36

28 U.S.C. § 1447 . . . . . APX-36

29 U.S.C § 185
(LMRA § 301) APX-37

42 U.S.C. § 2000e-5(c) APX-39

FEDERAL RULES OF
APPELLATE PROCEDURE APX-40

Rule 4 . . . . . APX-40

FEDERAL RULES OF
CIVIL PROCEDURE APX-44

Rule 11 . . . . . APX-44

Rule 15(a) APX-47

Rule 54 . . . . . APX-48

Rule 56 . . . . . APX-51

Rule 58 . . . . . APX-53

LOCAL RULES FOR
THE CENTRAL DISTRICT
OF CALIFORNIA: APX-54

Rule 16.10 . . . . . APX-54

CALIFORNIA GOVERNMENT
CODE SECTIONS APX-55

Government Code § 12940 . . . . . APX-55

Government Code § 12965 . . . . . APX-63

LETTER BRIEF TO NINTH CIRCUIT:
dated February 6, 1998 . . . . . APX-68

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

The Constitution of the United States of America

Article I 7, 14

Article III . . . . . i, 2, 7, 15, 16, 18, 19, 22, 25, APX-69

Article III § 1 . . . . . 3, 7, 13, 14

Article III § 2 3

Article III § 2 cl. 1 . . . . . 4, 7, 13, 14, 15, 16, 20, 25

The Seventh Amendment . . i, 4, 26, APX-36

CODES AND STATUTES:

The United States Code:

28 U.S.C § 1254(1) 2

28 U.S.C. 1447 . . . . . 3, APX-36

28 U.S.C. § 1447(c) . . . . i, 1, 4, 7, 11, 16, 17, 18, 20, 21, 22, 21, 22, 25, APP-37

28 U.S.C. § 1447(c) (pre-1988) 17, 21

29 U.S.C § 185 . . . . . 3, 15, APX-38

42 U.S.C. § 2000e-5(c) . . . 3, 4, 8, 23, 24. APX-40

California Government Code:

§ 12940 . . . . . 3, 6, APX-54

§ 12940(a) 4

§ 12965 . . . . . 3, APX-62

§ 12965(b) 4

RULES OF COURT AND PROCEDURE:

Rules of the Supreme Court of the United States

Rule 10(a) 2

Rules 10(c) 2

Rule 24 1.(b) 1

Federal Rules of Appellate Procedure:

Rule 4 . . . . . APX-41

Rule 4(a)(1) 30

Rule 4(a)(4) . . . . . ii, 3, 5

Rule 4(a)(4)(D) 30

Federal Rules of Civil Procedure:

Rule 11 . . . . . ii, 3, 28, 29, APX-44

Rule 12(b) 25

Rule 15(a) . . . . . i, 3, 4, 6, 15, 19, 20, 24, 25, APX-48

Rule 54 . . . . . APX-48

Rule 54(2)(B) 29

Rule 54(d)(2) . . . . . ii, 3, APX 55

Rule 56 . . . . . 3, 26, APX-51

Rule 56(a) 5

Rule 58 . . . . . 3, 29

Local Rules for the Central
District of California:

Rule 16.10 . . . . . 29, APX-55

CASES:

Associated Builders & Contractors, Inc. v.
Local 302
109 F.3d. 1353
(9th Cir. May 12, 1997) APX-71

Baddie vs. Berkely Farms, Inc.
64 F.3d 487 (9th Cir. 1995) 25

Baily v.Wal-Mart Stores,Inc.
981 F.Supp.1415
(N.D.Ala.Nov.6,1997) 18, 19

Bullen v. De Bretteville
239 F.2d 824 (9th Cir.1956) 25

Carnegie-Mellon University v.
Cohill
484 U.S. 343,
108 S.Ct. 614 (1988) . . . 15-18, 20, 22

Caterpillar Inc. v. Lewis
519 U.S. 61, 117 S.Ct. 467
(1996) 11, APX-69, APX-70

Caterpillar vs. Williams
482 U.S. 386,
107 S.Ct. 2425 (1986) 15

Celotex vs. Catrett
477 U.S. 317,
106 S.Ct. 2548 (1986) 27

Christiansburg Garment Co. v.
Equal Employment Opportunity Comm'n
434 U.S. 412,
98 S.Ct. 694 (1978) 15

Davis v.
North Carolina Department of Correction
48 F.3d 134 (1994) 24

Egelston vs.
State University College at Geneseo
535 F.2d 752 (1976) 26

Felton v. Unisource Corporation
940 F.2d. 503
(9th Cir. 1991) . . . . . APX 69, APX 70

FW/PBS, Inc. v. Dallas
493 U.S. 215,
110 S.Ct. 596 (1990) 7, 29

Harrell v. 20th Century Ins. Co.
934 F.2d 203 (9th Cir.1991) 16, 22

Harris v. Provident Life and Acc. Co
26 F.3d. 930 (9th Circuit 1994). APX 69

Lexecon Inc. v. Milberg, Weiss,
___U.S.___,
118 S.Ct 956 (Mar. 3, 1998) 21

Liberty Mutual Ins. Co. v. Wetzel
424 U.S. 737,
96 S.Ct. 1202 (1976) 7

Louisville & Nashville R. Co. v. Mottley
211 U.S. 149,
29 S.Ct. 42 (1908) 7

McDonnell v. Green
411 U.S. 792,
93 S.Ct. 1817 (1973) 27

New York Gaslight Club, Inc. v. Carey
447 U.S. 54,
100 S.Ct. 2024 (1980) 23-24

Rains vs. Criterion Systems
80 F.3d. 339, 342 (9th Cir. 1996) . . 29

Strawbridge v. Curtiss
3 Cranch 267, 2 L.Ed. 435 (1806) . . 14

TEXTS & ARTICLES:

Schwarzer, Tashima & Wagstaffe, CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL 460 Remand to State Court ¶ 2:1101 (The Rutter Group 1996). . . . 17

PETITION FOR WRIT OF CERTIORARI[1]

COMES NOW PETITIONER RICHARD EPSTEIN and prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review its decision denying PETITIONER'S appeal from a judgment and a series of orders [including an order awarding attorney fees against him (and his attorney)] following the failure by the United States District Court for the Central District of California to remand pursuant to the mandatory provisions of 28 U.S.C. § 1447(c).[2]

OPINIONS BELOW

The Ninth Circuit's unpublished opinion [a copy downloaded from Westlaw is included in the appendix to this PETITION] was filed on March 19, 1998 [the decision is found at 1998 WL 133368].

---

[1]. **All parties to these proceedings are listed in the caption of the case as required under Rule 24 1.(b) of the Rules of the Supreme Court of the United States. When the term "RESPONDENTS is used in the body of this PETITION it refers to all of the DEFENDANTS in the litigation, when the term RESPONDENT is used singularly it refers to the employing entity "SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP" which is sometimes also referred to as "SCPMG")**

[2]. **The order denying PETITIONER'S MOTION for remand pursuant to the mandatory provisions of 28 U.S.C. § 1447(c), the Summary Judgment entered in the District Court, and the Orders awarding attorney fees against PETITIONER and one of his attorneys are included as part of the appendix.**

JURISDICTION

This Court has jurisdiction over the subject matter of this PETITION 28 U.S.C § 1254(1) and Rules 10(a) and 10(c) of the Rules of the Supreme Court of the United States.

This PETITION is based upon PETITIONER'S contention that the District Court lacked subject matter jurisdiction under Article III of the Constitution of the United States of America to enter any order, judgment or decree, other than an order remanding the matter back to the Superior Court of the State of California.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN PETITION[3]

The issues discussed in this PETITION involve the following laws, statutes, and constitutional provisions, each of which is set forth in full in the Appendix which follows the text of this PETITION:

---

[3] The constitutional and statutory provisions involved in the case are set out in the appendix along with the unpublished opinion of the Court of Appeals (downloaded from Westlaw), and the various orders and judgment which are relevant to the issues raised by this PETITION.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE III §§ 1 & 2
The SEVENTH AMENDMENT

THE UNITED STATES CODE

28 U.S.C. 1447, 29 U.S.C. § 185 and 42 U.S.C. § 2000e-5(c)

THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4(a)(4)

THE FEDERAL RULES OF CIVIL PROCEDURE

Rules 11, 15(a), 54(d)(2), 56 and 58

CALIFORNIA GOVERNMENT CODE SECTIONS

Government Code §§ 12940 and 12965

ISSUES ADDRESSED IN THIS PETITION

This PETITION addresses the following issues of law:

(1) PETITIONER'S right to have his claims under state law [specifically California's Fair Employment and Housing Act as set forth in California Government Code §§ 12940(a) and 12965(b)] determined in a state court [based upon a motion to remand under 28 U.S.C. § 1447(c)], following exercise of his right under Rule 15(a) of the Federal Rules of Civil Procedure to amend his pleadings, and the elimination all grounds upon which federal juris-diction exists under Article III § 2 clause 1 of the Constitution of the United States of America.

(2) The effect of the 1988 amendment of 28 U.S.C. § 1447(c) on pleadings which are amended [before the entry of any orders in the case] by eliminating claims within the jurisdictional limits set forth in Article III § 2 cl. 1 of the Constitution.

(3) The deference a federal court should give to the Congressionally mandated preference, as set forth in 42 USC § 2000e-5(c), for resolution of claims in employment discrimination cases under state, rather than federal anti-discrimination laws?

(4) The limits of a federal court's ability to deprive a litigant of his or her constitutional rights under the Seventh Amendment, to a trial by jury, when making

a factual determinations on motions for summary judgment brought under Rule 56(a) of the Federal Rules of Civil Procedure.

(5) The necessity for a separate notice of appeal under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, where a District Court's subject matter jurisdiction is the basis of a perfected appeal.

PETITIONER'S STATEMENT OF THE CASE[4]

The pending action was commenced by PETITIONER who claims that RESPONDENTS violated California law by contriving a set of incidents during 1994 in order to justify

---

[4]. Many of the facts recited in the Court of Appeals' opinion are in conflict with the facts set forth and argued both in opposition to the motion for summary judgment, and in the brief filed in support of his appeal (see in particular APPELLANT'S OPENING BRIEF at pages 16 through 29 inclusive). Further, although the Court of Appeals makes reference to what it refers to as "a long history of disciplinary problems, including an episode where he physically assaulted his supervisor", the record is uncontradicted that there was "no evidence of any disciplinary action between July 6, 1992 and November 16, 1993" (see APPELLANT'S OPENING BRIEF at page 23) which precludes any reference to any conduct prior to November 16, 1993 (see ¶ 2052 of the Collective Bargaining Agreement which is set forth verbatim in the Appendix attached to this Petition). There is no evidence of any episode in which Petitioner "physically assaulted his supervisor", and arguably PETITIONER'S "long employment history" itself raises a contrary inference. There was, therefore, a significant amount of evidence upon which a jury could conclude Petitioner was set up.

their decision to terminate his employment in order to preserve a younger employee's position.

The original complaint, prepared by PETITIONER without the assistance of counsel, consisted of form pleadings prepared and approved for use in California by the California Judicial Council [see the original complaint set forth in APPELLANT'S EXCERPTS TAB 2 at pages E 00 8 through E 0031 inclusive and page 2 of the Court of Appeals' opinion attached to this petition]. Included in the forms were a series of allegations of fraud in connection with the grievance proceedings which followed what PETITIONER contends was an illegal termination in violation of California law [Government Code § 12940].

Based upon PETITIONER'S fraud claims his case was removed to the United States District Court for the Central District of California on December 7, 1995.

Immediately following removal to the District Court PETITIONER retained counsel, who in turn exercised PETITIONER'S right to amend his complaint under Rule 15(a) of the Federal Rules of Civil Procedure.

In PETITIONER'S First Amended Complaint [see APX. pages 7 through 16 inclusive], which is the operative pleading in this case, no relief is sought under Federal law and there no diversity allegation.

None of the District Court orders or judgments issued after removal [with the exception of its denial of

PETITIONER'S motion to remand pursuant to 28 U.S.C. § 1447(c)] involved the interpretation, application, or resolution of federal law.

PRIMARY ISSUE RAISED BY PETITION[5]

The primary issue raised by this PETITION involves the right of a state court litigant to avoid federal jurisdiction by the elimination of all claims which fall under Article III. It is an issue that is at the core of the federal judicial system based upon the limited grant of jurisdiction under Article III, and is not subject to expansion by either Congress or the Federal Courts themselves [see ARTICLE I and ARTICLE III § 1].

There are no reported appellate decisions which deal with the issue as presented by PETITIONER, either on appeal or in the body of this PETITION.

---

[5]. Because the primary focus of this PETITION involves subject matter jurisdiction over PETITIONER'S claims, there is an obligation under Article III § 2 cl. 1 to vacate all orders which were based on the improper retention of jurisdiction following a motion under 28 U.S.C. § 1447(c). see: FW/PBS, Inc. v. Dallas 493 U.S. 215, 230-231, 110 S.Ct. 596, 607-608 (1990) Liberty Mutual Ins. Co. v. Wetzel 424 U.S. 737, 740, 96 S.Ct. 1202, 1204 (1976); Louisville & Nashville R. Co. v. Mottley 211 U.S. 149, 152, 29 S.Ct. 42, 43 (1908).

REASONS FOR GRANTING WRIT

This PETITION should be granted because it raises a number of important procedural issues that have been left unresolved by prior decisions of both the Circuits and this Court. These issues are critical in guiding litigants in a system of laws under which Congress expressed a preference for adjudication of claims under state law [see 42 U.S.C. § 2000e-5(c)].

Because the present PETITION deals with an issue concerning what courts should be allowed to protect employees from discriminatory practices in the workplace, a resolution of the procedural issues raised by this PETITION is both appropriate and necessary at this time. The necessity for such clarification is illustrated by the jurisdictional errors which both the District Court and the Ninth Circuit committed in this litigation.

FACTUAL BACKGROUND OF APPEAL

PETITIONER was initially hired by RESPONDENT as a record clerk in 1979 [see DEF.FACT # 1 APP.EX. tab # 14 at page E 0131 lines 3 through 4 inclusive]. After two and a half years PETITIONER left RESPONDENT'S employment [see DEF.FACT # 3 APP.EX. tab # 14 at page E 0131 lines 3 through 4 inclusive]. PETITIONER resumed his employment with RESPONDENT in 1982 and continued in their employment until November of 1994, when he was terminated as a result of his alleged mistreatment of a patient, and his failure to follow the instructions given him

by the on duty orthopedic surgeon Dr. CRAIG HARWIN [excerpts of which are attached to PLTF'S COUNSEL'S DECL. APP.EX. tab # 17 pages E 0493 through E 0509 inclusive] [see PL.DECL.APP.EX tab # 16 ¶ 2 at page E 0440 through page E 0441 line 4 inclusive].[6]

PETITIONER alleges that the justification for the termination of his long term employment by RESPONDENT in November of 1994 was contrived, and that he had not "mistreated" the patient whose complaints were the alleged basis for his termination.

PETITIONER supported his allegations of contrivance with his recitation of the facts in a declaration submitted in opposition to RESPONDENT'S motion for summary judgment [PL.DECL. APP. EX tab # 16 ¶ 3 at page E 0441 line 5 through page E 0442 line 14 inclusive], the deposition testimony of Dr. CRAIG HARWIN, and a memorandum from the only witness which had been obtained from RESPONDENT during discovery.

---

[6]. PETITIONER'S long employment history would appear to be in direct conflict with the allegation that he had been a problem employee. Problem employees, as a rule, don't last 17 years and receive accommodations during their last year of employment.

PROCEDURAL HISTORY OF PETITIONER'S CLAIM

PETITIONER commenced this litigation pro se on November 8, 1995 with the filing of a 25 page form complaint in the Superior Court of the State of California for the County of Los Angeles [see complaint APP.EX tab # 2 pages E 0008 through E 0031 inclusive][7]. The inartfully drawn pleading attempted to assert a claim for relief based upon various theories, including "Discrimination, Fraud, Severe Malice, Severe Emotional Distress due to Wrongful Termination".

On or about December 7, 1995 RESPONDENTS removed PETITIONER'S action to the United States District Court for the Central District of California [see notice of the removal etc. APP.EX. tab # 3].

On January 9, 1996 PETITIONER [who had now

---

[7]. Reference to the Appendix of Exhibits filed with the Ninth Circuit will be by use of the abbreviation APP.EX followed by the page or tab number where the document appears. References to the Appendix which is at the end of this brief will be made by use of the abbreviation APX followed by the Appendix page number.

[8]. In his fraud claim, which the Court of Appeal used to support federal jurisdiction, PETITIONER alleged that RESPONDENTS had created false charges to justify his wrongful termination. That was the principal issue which PETITIONER claims was left unresolved by the District Court's grant of summary judgment (see PLAINTIFF DEC. APP.EX. ¶¶ 8 through 15 inclusive and footnotes 4 and 10 of this PETITION).

retained counsel] in response to RESPONDENTS' motion to dismiss filed an amended complaint [see First Amended Complaint APX pages 7 through 16 inclusive] in which he disclaimed any interest in pursuing any claims under federal law [see ¶¶ 7 & 13 of the First Amended Complaint at APX-9-10 and APX-11 of the Apendix to this PETITION].

On January 17, 1996 PETITIONER, through counsel, filed a notice of motion to remand his action pursuant to 28 U.S.C. § 1447(c) [see NOTICE OF MOTION TO REMAND, etc. APP.EX. tab # 5] based upon the District Court's lack of subject matter jurisdiction over the claims pled in the amended complaint which was now the operative pleading in the litigation.

The District Court denied PETITIONER'S motion to remand by order entered on February 7, 1996 [see ORDER DENYING APX. page 19][9].

Following denial of PETITIONER'S motion to remand RESPONDENTS filed a new motion to dismiss [see NOTICE AND MOTION APP.EX. tab # 6] which was denied in part, and granted in part [see ORDER and JUDGMENT APX. pages 17 through 20 inclusive]

---

[9]. During oral arguments the Ninth Circuit panel suggest the jurisdictional argument raised by the motion to remand had been waived as a result of PETITIONER'S failure to file an interlocutory appeal. In response PETITIONER submited a letter brief, citing Caterpillar Inc. v. Lewis 519 U.S. 61, 117 S.Ct. 467 (1996). The letter brief is set forth at pages APX 72 through APX 75 inclusive of the appendix to this PETITION.

The District Court's order on RESPONDENTS' second motion to dismiss [which eliminated a claim under various provisions of California's constitution, and all of his claims for relief against the individual defendants under state law] left a single cause of action for damages under California's Fair Employment and Housing Act. There has never been a diversity basis for federal jurisdiction in this litigation.

On April 8, 1996 RESPONDENT [now the only Defendant] filed its answer to PETITIONER'S Amended Complaint on April 8, 1996 [see ANSWER APP.EX. tab # 12 at page E 0015 - E 0125 inclusive].

Subsequently RESPONDENT filed a motion for summary judgment on August 19, 1996 [see NOTICE OF MOTION APP.EX. tab # 13], to which PETITIONER responded with a declaration setting forth his version of the events leading up to his termination [see PLAINTIFF'S DEC. APP.EX. tab # 16 at page E -0440 - E 0486][10]. The motion was granted on September 16, 1996 [see ORDER GRANTING APP.EX. tab #18].

---

[10] The Court of Appeals' statement in its decision that "it is undisputed that Epstein had a long history of disciplinary problems" is in direct conflict with the factual recitations contained in ¶¶ 8 through 15 inclusive of PETITIONERS DECLARATION APP.EX. Tab 16 pages E 0443 through E 0446. Significantly, as set forth in ¶ 15 at page E 0445 lines 20 through E 0446, PETITIONER had received an award for the manner he interacted with patients. see footnotes 4 and 8 and text at page 8 through 9 of this PETITION.

Judgment was entered on September 26, 1996 [see JUDGMENT at APX page 23].

Notice of Appeal was filed with the Clerk of the District Court on October 15, 1996 [see NOTICE OF APPEAL APX pages 25 through 26] in which PETITIONER challenged the District Court's "improper retention of jurisdiction".

After PETITIONER filed his NOTICE OF APPEAL the District Court entered a series of orders awarding attorney fees against both PETITIONER and his counsel [see orders at APX pages 27 through 34 inclusive]

PETITIONER'S LEGAL ARGUMENTS

I.

IN THE ABSENCE OF DIVERSITY A FEDERAL COURT DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO FORCE A STATE COURT LITIGANT TO ADJUDICATE CLAIMS IN A FEDERAL COURT WHICH ARISE EXCLUSIVELY UNDER THE LAWS OF A STATE,

A federal court cannot exceed the jurisdictional limits imposed by the Constitution. The judicial authority of a federal court created under Article III § 1, is limited by Article III § 2 cl. 1 which provides:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws

of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; –between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

A federal court does not have subject matter jurisdiction in the absence of either diversity or a federally created cause of action.

see: Strawbridge v. Curtiss 3 Cranch 267, 2 L.Ed. 435 (1806)

Congress has no authority under either Article I or Article III § 1 to either:

(a) Create tribunals to usurp the authority of the states to resolve issues arising under state law between its own residents;

(b) Take judicial authority from state courts when acting outside the limits of Article III § 2 cl. 1; or

Because of the constitutional limits on judicial authority, any attempt to remove matters from a state court

which are beyond the limits of Article III § 2 cl. 1, or the retention of jurisdiction over such matters is void.

II.

EVEN IF THE DISTRICT COURT INITIALLY HAD JURISDICTION OVER PETITIONER'S CLAIMS, ITS RETENTION OF JURISDICTION WAS AN ABUSE OF DISCRETION UNDER THE COURT'S REASONING IN CARNEGIE-MELLON UNIVERSITY V. COHILL 484 U.S. 343, 108 S.Ct. 614 (1988)

PETITIONER, an inexperienced layman, initiated his claims for relief under California law. Although parts of his initial pleading could arguably fall within the scope of a collective bargaining agreement and provide a potential basis for federal jurisdiction, his claims were intended to fall within the jurisdiction of the courts of California where the proceedings were in fact commenced.[11]

Thus, like the Plaintiff in Carnegie-Mellon University v. Cohill 484 U.S. 343, 108 S.Ct. 614 (1988), PETITIONER, upon retention of counsel immediately elected to amended his pleading under the provisions of Rule 15(a). However, in the present litigation the amendment took place

---

[11] Arguably the limited nexus of PETITIONER'S claims to a collective bargaining agreement [based upon the exclusivity provisions § 301 of the Labor Management Relations Act (29 U.S.C. § 185)] does not meet the federal question requirement of Article III. see: Caterpillar vs. Williams 482 U.S. 386, 396-397, 107 S.Ct. 2425, 2431-2432 fn 10 (1986).

at a point in the litigation when leave of court was not required.

Thus, unlike all of the cases in which this Court, and the Circuits, have previously addressed the issue, the amendment which eliminated federal jurisdiction in the pending litigation was not based upon judicial discretion, or upon a judicial determination of issues arising under federal law, it was based upon PETITIONER'S right to modify his pleadings in any way he saw fit before his adversary filed a responsive pleading and submitted the controversy to final adjudication by a federal court.

Because PETITIONER'S amendment, which eliminated all federal claims, took place before any rulings under federal law, the retention of jurisdiction was an abuse of discretion because it resulted in the adjudication of claims which the District Court did not have jurisdiction over ARTICLE III[12].

---

[12]. The Ninth Circuit reliance on its prior decision in Harrell v. 20th Century Ins. Co. 934 F.2d 203, 205 (9th Cir.1991) was improper for several reasons. The decision is distinguishable because, in the first instance the parties did not dispute "the ability to adjudicate their state claims" (see 934 F.2d. 205), more significantly, however, the decision is flawed because it accepts as "well settled" an underlying premise which appears to be in direct conflict with the 1988 amendment to 28 U.S.C. 1447(c) and the limits imposed by Article III § 2 cl. 1. In part this resulted from the Ninth Circuit's reliance on a series of pre 1988 cases which can no longer be considered good law.

In Carnegie-Mellon University supra this Court upheld the propriety of an amendment which led to the lower court's exercise of its discretionary power to remand under the provisions of 28 U.S.C. § 1447(c) as it existed at the time. In upholding the lower court's exercise of discretion, this Court observed at 484 U.S. 619:

> . . . when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction . . .

Based upon this Court's holding in Carnegie-Mellon University v. Cohill supra, one authority noted:

> When the federal claims have dropped out of the lawsuit in its early stages and only state law claims remain, it may be an abuse of discretion for the federal District Court to retain the case.
>
> see: Schwarzer, Tashima & Wagstaffe, CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL 460 Remand to State Court ¶ 2:1101 (The Rutter Group 1996).

What this Court left unanswered in Carnegie-Mellon University v. Cohill supra, and perhaps even more importantly what appears to have received little attention since the 1988 amendment to 28 U.S.C. 1447(c), is the question of how early in the proceeding a court's refusal to remand results in the court's abuse of its discretion.

As illustrated by the present action, that is a question that the Ninth Circuit ignored in its unpublished decision, and which was critical to a determination of PETITIONER'S appeal from the district court's continued exercise of jurisdiction in excess of its Article III authority in violation of the specific mandate of 28 U.S.C. § 1447(c).

Although there are no appellate decisions dealing with the question raised, the recent decision in Baily v. Wal-Mart Stores, Inc 981 F.Supp. 1415, 1416-1417 (N.D. Ala. Nov. 6, 1997) illustrates how at least one District Judge viewed the issues which are the basis for this PETITION[13].

As set forth in the District Court's decision in Baily v. Wal-Mart Stores, Inc. supra, this Court's decision in Carnegie-Mellon University supra must be reevaluated at this time because of Congress' 1988 modification to 28 U.S. 1447(c) which:

> . . . from November 19, 1988, until today, subsection (c) has read as follows:
>
> > If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded (emphasis added).

---

[13] The District Court decision in Baily v. Wal-Mart Stores, Inc. supra had not been published at the time briefing was completed in this case. The jurisdiction issue, which the Court of Appeals chose to ignore, had been thoroughly briefed.

Thus, in contrast with the unpublished decision of the Court of Appeals in the present action, the District Judge in Baily v. Wal-Mart Stores, Inc supra held:

> It is quite apparent to this court that Congress intended to create in a federal court control over what changes it will allow in plaintiff's contentions after removal and in what parties he can add[14], while recognizing that if such changes result in a loss of subject matter jurisdiction, no discretion remains in the federal court to retain jurisdiction, and that remand becomes automatic. The fact that the case was properly removed in the first place becomes irrelevant. (emphasis added).

In the pending action (filed by an inexperienced layman) less than two and a half months had passed from the filing and a little over a month had passed from removal when counsel (immediately upon retention) amended the operative pleading pursuant to Rule 15(a) in order to eliminate any claim upon which federal jurisdiction could be supported under ARTICLE III. Despite these facts, and this Court's admonition that the denial of remand at an early stage in the proceeding might constitute an abuse of discretion, the District Court refused to abide by the mandate of 28 U.S.C. 1447(c).

---

[14] This control, however, does not exist under Rule 15(a) of the Federal Rules of Civil Procedure until after the first responsive pleadings.

What is significant is that by refusing to acknowledge the jurisdictional impact of PETITIONER'S amended complaint, the court placed a restriction on his right under Rule 15(a) to make any amendment to his complaint which his newly retained counsel deemed appropriate.

By refusing to recognize the jurisdictional impact of PETITIONER'S amended complaint on his motion under 28 USC 1447(c), the court ignored his right to select both the legal basis upon which his claims were made, and the forum in which those claims were to be pursued.

III.

THE 1988 AMENDMENT TO 28 U.S.C. § 1447(c) EXPRESSED A CONGRESSIONAL MANDATE TO RETURN CASES OVER WHICH FEDERAL COURTS LACKED SUBJECT MATTER JURISDICTION TO THE STATE COURTS IN WHICH THEY WERE ORIGINALLY FILED[15]

In its decision in Carnegie-Mellon University supra this Court based conclusions concerning the discretionary authority of a District Court on the provisions of 28 U.S.C.

---

[15] Arguably a statute which mandated retention of jurisdiction after all claims sanctioned under ARTICLE III § 2 cl. 1 had been eliminated would be unconstitutional. By eliminating the ambiguity in the prior version of 28 U.S.C. § 1447(c) (which seemed to suggest that a federal court had discretion on this issue) Congress resolved the constitutional issue, before it was raised in this Court, by mandating remand to the originating state court.

§ 1447(c) which at the time provided:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case (emphasis added).

In 1988, however, the language of the statute was changed, and the issue of "jurisdiction" is no longer tied exclusively to the time of removal as suggested by both the District Court and the Ninth Circuit in the pending case. As amended 28 U.S.C. § 1447(c) now provides:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded[16].

Thus under the current version of 28 U.S.C. § 1447(c) the jurisdictional issue which mandates remand may arise at any time during the course of the litigation, and is no

---

[16] As set forth in Justice Souter's recent opinion in Lexecon Inc. v. Milberg, Weiss, et al. ___ U.S. ___, 118 S.Ct. 956, 962 (March 3, 1998) the term "shall" in a statute "normally creates an obligation impervious to judicial discretion". Based upon the foregoing Justice Souter observed: –

> If we do our job of reading the statute whole, we have to give effect to this plain command, see Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476, 112 S.Ct. 2589, 2594-2595, 120 L.Ed.2d 379 (1992), even if doing that will reverse the longstanding practice under the statute and the rule . . .

longer to be determined solely upon the pleadings as they existed at the time of removal. Therefore, even assuming the existence of some level of discretion following this Court's decision in Carnegie-Mellon University supra, that discretion disappeared with the 1988 amendment to 28 U.S.C. § 1447(c) which now mandates remand once Article III jurisdiction has been eliminated, and the decision of the circuits (including the Ninth Circuits decision Harrell v. 20th Century Ins. Co. supra] suggesting a contrary result can no longer be relied upon.

As a result the decision of the District Court to retain jurisdiction following an amendment which eliminated ARTICLE III jurisdiction, and the Ninth Circuit's unpublished decision suggesting that the issue was one of discretion, were constitutionally improper, and mandate remedial action.

IV.

CONGRESS HAS EXPRESSED A PREFERENCE FOR THE ADJUDICATION OF EMPLOYMENT DISCRIMINATION CASES UNDER STATE MANDATED PROCEDURES

RESPONDENTS have argued that there is something inappropriate about a litigant's attempts to avoid having his or her claims adjudicated by a federal court. Congress has, however, created a system for handling employment discrimination claims which gives deference to a state's interests in regulating these matters. Thus, under Title VII,

preference is given to enforcement of state legislated anti-discrimination laws as illustrated by 42 U.S.C. § 2000e-5(c) which mandates referral to state agencies, and deferral of federal enforcement proceedings until an adequate amount of time has passed to allow state law to deal with the problems.

As this Court observed in New York Gaslight Club, Inc. v. Carey 447 U.S. 54, 65, 100 S.Ct. 2024, 2031-2032 (1980):

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.

And continuing at 447 U.S. 67, 100 S.Ct. 2033 this Court observed that:

> Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums. (emphasis added)

Subsequently the Fourth Circuit, relying on this Court's ruling in New York Gaslight Club, Inc. v. Carey supra observed in Davis v. North Carolina Department of Correction 48 F.3d 134, 137 (4th Cir. 1994) that Congress' enactment of 42 U.S.C. § 2000e-5(c) was:

> . . . rooted in a "policy of cooperation" between the federal government and the states, id. at 64, 100 S.Ct. at 2031, and is designed to give state agencies " 'a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of discrimination,'

V.

UNDER RULE 15(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE A LITIGANT HAS AN ABSOLUTE RIGHT TO ELIMINATE ANY CLAIMS OR CAUSES OF ACTION WHICH HE OR SHE HAS DECIDED NOT TO PURSUE BEFORE THE CASE IS AT ISSUE

PETITIONER had the right to file an amended complaint as a matter of right under Rule 15(a) of the Federal Rules of Civil Procedure until such time as RESPONDENTS had filed a responsive pleading. This he did, and from the time of its filing the amended complaint superseded the original, which from that point in time is treated as non-existent.

see: Bullen v. De Bretteville 239 F.2d 824, 833 (9th Cir.1956)

It is equally clear that in enacting Rule 15(a) of the Federal Rules of Civil Procedure its draftsman did not intend to place restrictions on the types of amendments which a litigant could, or could not make before the case came to issue. It should be apparent that the imposition of such a restriction would defeat the underlying concept of allowing a plaintiff the "right" to revise his or her pleadings before the case is at issue [even in the face of adverse parties' first attack on the pleadings under Rule 12(b)].

The very purpose of allowing a litigant one chance to amend [as of right] is to allow a plaintiff the opportunity to make any change he or she may deem appropriate before the litigation is underway.

By ignoring the jurisdictional impact of such an amendment on a motion under 28 U.S.C. 1447(c), both the District Court and the Ninth Circuit deprived PETITIONER of his right as a litigant under Article III to remain in the forum of his choosing.

While RESPONDENTS may argue that a litigant should not, through artful pleading, be allowed to manipulate his choice of forum, that argument conflicts with the limits on federal judicial jurisdiction under ARTICLE III § 2 cl. 1.

Thus in Baddie v. Berkely Farms, Inc. 64 F.3d 487 (9th Cir. 1995) the Court held at 64 F.3d 490-491:

> . . . A plaintiff is entitled to file both state and federal causes of action in state court. The defendant is entitled to remove. The plaintiff is entitled to settle certain claims or dismiss them . .

VI.

THIS COURT SHOULD NOT ALLOW MOTIONS UNDER RULE 56 TO BECOME A SUBSTITUTE FOR JURY TRIALS IN EMPLOYMENT LITIGATION

Under the Seventh Amendment to the Constitution PETITIONER was entitled to have factual issues raised by his claims determined by a jury, rather than by a judge. Instead all of the facts presented by PETITIONER in opposition to RESPONDENT'S summary judgment motion were ignored, and both the District Court and the Ninth Circuit accepted the factual recitations presented by the moving party.

Thus, despite his recitation of facts which demonstrated a conflict in the evidence, PETITIONER was deprived of his right to have his claims determined by a jury as required under the Seventh Amendment. As the Second Circuit observed in Egelston vs. State University College at Geneseo 535 F.2d 752, 754 (2nd Cir. 1976):

> . . . [S]ummary judgment must be used sparingly "since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury

In Celotex vs. Catrett 477 U.S. 317, 106 S.Ct. 2548 (1986) the Court observed that:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

In recent years there has been a trend, particularly in the federal courts, to eliminate jury trials in employment cases by an overly zealous application of the test developed by this Court in McDonnell v. Green 411 U.S. 792, 93 S.Ct. 1817 (1973) in which an employee who has demonstrated a prima facia case, can still be deprived of a trial by jury based solely upon his employer's presentation of a vaguely credible business reason for his or her actions.

The difficulty with a plaintiff's burden in an employment discrimination case when confronted with the shifting burden under the rules which have evolved in the wake of McDonnell v. Green supra is that employees are always at a disadvantage because of the nature of their claims, the risks encountered by co-workers who are called upon as witnesses, and the ability of institutional employers to manipulate personnel files before and after the commencement of litigation. As a result, even under the best of circumstances proof of the employer's illegal conduct

is difficult, at best.

History also tells us that in cases alleging disparate treatment based upon age and religion, such as the pending action, employers are not likely to admit to their true motives, and co-workers fearing retaliation are frequently unwilling to assist out of fear for their own job security.

VII.

THE DISTRICT COURT DID NOT HAVE THE JURISDICTION TO MAKE A POST JUDGMENT AWARD OF ATTORNEY FEES[17]

Because the proceedings in the District Court did not involve any issues of federal law, and the post judgment award of attorney fees was based upon state, not federal law, all of the rulings, including the post judgment award

---

[17] The standards for awarding a successful defendant attorney fees in an employment discrimination suit are set forth in Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n 434 U.S. 412, 421, 98 S.Ct. 694 (1978). Although those standards were arguably not met in the pending litigation, the primary issue addressed in the pending PETITION involves the issue of whether the District Court even had jurisdiction to make the post judgment order in the first instance, and whether an amended notice of appeal was required to protect the jurisdictional issues which had, in fact, already been raised in the notice of appeal filed on October 15, 1996. At a minimum there is no authority (in the absence of a proceeding under Rule 11) for imposing a monetary burden for RESPONDENTS' attorney fees on PETITIONER'S counsel.

of costs and attorney fees against PETITIONER and his counsel (who was not a party to the litigation) were in excess of the court's jurisdiction (in the absence of a proceeding under Rule 11). Therefore, even in the absence of a separate notice of appeal both the Ninth Circuit and this Court (for the reasons discussed earlier) are obligated to vacate the award of attorney fees sua sponte.

The point is that whether an amended notice of appeal was required to challenge the District Court's non jurisdictional errors in a post judgment proceeding, additional challenges to subject matter jurisdiction were not required because each of the appellate courts reviewing the pending appeal from the District Court's rulings has an "independent obligation" to review these matters sua sponte, whether raised by the litigants or not.

see; FW/PBS, Inc. v. Dallas supra, Rains vs. Criterion Systems 80 F.3d. 339, 342 (9th Cir. 1996)

PETITIONER filed his notice of appeal on October 15, 1996 (see APX pages 25-26) nineteen days after the entry of judgment [five days after the last day for filing a motion for attorney fees under Rule 54(2)(B)]. Although Local Rule 16.10 of the local rules for the Central District of California (at the time of the motion) provided for a thirty day period in which to file a motion for attorney fees, it does not provide for an extension of the time for filing a notice of appeal under Rule 58.

Therefore the provisions of Rule 4(a)(1) control, and the notice of appeal filed by PETITIONER (which specifically challenged the jurisdiction of the District Court to enter any orders) was sufficient to place the District Court's jurisdiction in issue. Because the order awarding attorney fees was not based upon an order described in Rule 4(a)(4)(D) an amendment to the notice of appeal filed on October 15, 1998 was not required and the Ninth Circuit was obligated to consider jurisdictional issues raised by PETITIONER.

CONCLUSION

For the reasons above stated this Petition for a Writ of Certiorari should be granted, and an order issued to the Court of Appeals for the Ninth Circuit to require both the vacation of all orders (including the judgments, the dismissal of individual defendants and state law causes of action, and orders related to any award of costs and attorney fees) entered in the District Court, and the remand of the case itself to the Superior Court of the State of California for the County of Los Angeles.

LAW OFFICES OF JEROME ZAMOS

Jerome Zamos
Attorneys for Petitioner
RICHARD S. EPSTEIN

APPENDIX

OPINION OF THE NINTH CIRCUIT COURT OF APPEAL

(Cite as: 1998 WL 133263 (9th Cir.(Cal.)))

Richard EPSTEIN, Plaintiff-Appellant,

v.

Southern California Permanente Medical Group, dba Kaiser Permanente; Sharon Butterfield, an individual; Pam Carter, an individual; Cathy Cousineau, an individual; Ramah Baliber, an individual; Kaiser Foundation Health Plan, a Corporation; Kaiser Foundation Hospitals Inc., a nonprofit corporation, Defendants-Appellees.

No. 96-56629.
D.C. No. CV-95-08489-R.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 5, 1998.

Decided Mar. 19, 1998.

Appeal from the United States District Court for the Central District of California Manuel L. Real, District Judge, Presiding.

Before FLETCHER, MAGILL, [FN**] and T.G. NELSON, Circuit Judges.

FN** Honorable Frank J. Magill, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*1 Richard Epstein, an orthopedic technician, worked for Southern California Permanente Medical Group (SCPMG) from 1979 until 1994, when he was terminated after a long series of disciplinary actions against him. Epstein, who is Jewish and who exercised removal jurisdiction in the first instance. See Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 747 (9th Cir.1993) (a defendant may remove a nondiverse case from state court only if the plaintiff's complaint contains a federal cause of action and "could have been brought in the district court originally").

The fraud claims in Epstein's original complaint rely on alleged misrepresentations made by the defendants during grievance procedures mandated and governed by the CBA. See R. at 343-47 (§§ "2000-2053 of CBA). A court considering Epstein's fraud claims would have to interpret the terms of the CBA to determine if these alleged

misrepresentations were material or if they were otherwise protected by the CBA. Because of this, Epstein's complaint for fraud is "substantially dependent on analysis of a collective bargaining agreement," Paige v. Henry J. Kaiser Co., 826 F.2d 857, 861 (9th Cir.1987), and is preempted by § 301 of the LMRA. See Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 997 (9th Cir.1987) (noting that "[t]he preemptive force of section 301 is so powerful as to displace entirely any state claim based on a collective bargaining agreement, and any state claim whose outcome depends on analysis of the terms of the agreement" (citations omitted)).

Where a district court has removal jurisdiction in the first instance, "[i]t is well settled that a federal court [has] the power to hear claims ... even after the basis for removal jurisdiction is dropped from the proceedings." Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205 (9th Cir.1991) (quotations and citations omitted). Because "[i]t is generally within a district court's discretion ... to retain jurisdiction to adjudicate the pendent state claims," id., we conclude that the district court did not abuse its discretion in retaining jurisdiction over Epstein's state law claims.

Epstein next challenges the district court's grant of summary judgment against him on his claims of age and religious discrimination. This Court reviews the district court's grant of summary judgment de novo. See Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir.), cert. denied, — U.S. —, 118 S.Ct. 369, 139 L.Ed.2d 287 (1997). Summary judgment is proper if, taking all evidence in the light most favorable to Epstein, there is no genuine

issue as to any material fact and SCPMG is entitled to judgment as a matter of law. See id. "To avoid summary judgment, [the plaintiff] must do more than establish a prima facie case and deny the credibility of the defendant's witnesses. [H]e must produce specific, substantial evidence of pretext." Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9th Cir.1996) (quotations, citation, and alteration omitted).

*2 California's Fair Employment and Housing Act (FEHA) prohibits employment discrimination based on religion, see Cal. Gov't Code § "12940(a), and on age. See id. at § 12941. In employment discrimination cases where the plaintiff has not alleged direct evidence of discrimination, California courts apply the McDonnell Douglas shifting burden analysis. See Sada v. Robert F. Kennedy Med. Ctr., 56 Cal.App.4th 138, 65 Cal.Rptr.2d 112, 118 (Cal.Ct.App.1997) (applying McDonnell Douglas analysis to claim under § " 12940(a)); Nidds, 113 F.3d at 916 (applying shifting burden test to claim under § 12941, and citing California cases).

Under McDonnell Douglas, a plaintiff must first present a prima facie case of discrimination, which creates a presumption of discrimination. See Nidds, 113 F.3d at 916. The employer can then rebut this presumption by articulating a legitimate, nondiscriminatory reason for the termination. "Once the employer meets this burden, the presumption of discrimination drops away." Id. at 917. The plaintiff then has the burden of proving that this legitimate, nondiscriminatory reason is pretextual for

discrimination. "To satisfy that burden, and survive summary judgment, [the plaintiff] must produce enough evidence to allow a reasonable factfinder to conclude either: (a) that the alleged reason for [the plaintiff's] discharge was false, or (b) that the true reason for his discharge was a discriminatory one." Id. at 918.

Assuming that Epstein has proven prima facie cases of age and religious discrimination, SCPMG has rebutted successfully the presumptions of discrimination by articulating legitimate, nondiscriminatory reasons for Epstein's termination. It is undisputed that Epstein had a long history of disciplinary problems while employed by SCPMG, including an episode where he physically assaulted his supervisor. In addition, customers of SCPMG made numerous complaints regarding Epstein's attitude and conduct shortly before his termination.

Epstein has failed to produce any evidence tending to prove that SCPMG's stated reasons were not the real reasons for Epstein's termination, or that discrimination was the reason for his termination. During his deposition, Epstein stated that he "never heard any statements" that led him to believe that he was terminated because of his age, R. at 244, and admitted that the only basis for his claim of age discrimination was mere speculation. See id. at 243-44. Similarly, Epstein has failed to offer any support for his claim of religious discrimination. Epstein has not alleged that any of his supervisors (one of whom was Jewish) ever made any anti-Semitic statements to him, or ever engaged in any overtly anti-Semitic behavior. While Epstein did

allege that the percentage of Jewish employees at SCPMG had decreased over the years, Epstein provided no foundation for his estimates, and did not provide any evidence that the alleged reduction in the percentage of Jewish workers was due to anti-Semitism. Indeed, the only specific example he provided of Jewish employees leaving SCPMG was "a couple of doctors that were dissatisfied and left that happened to be Jewish." R. at 208. Taking this evidence in the light most favorable to Epstein, we conclude that no reasonable jury could have found that Epstein was the victim of age or religious discrimination. Accordingly, we affirm the district court's grant of summary judgment against Epstein.

*3 Finally, Epstein argues that the district court erred in requiring him to pay $62,185.75 for the defendants' attorneys fees. The order granting attorneys fees was filed after Epstein filed his notice of appeal of the district court's grant of summary judgment, and Epstein never filed a separate notice of appeal or amended his earlier notice of appeal. Because Epstein did not file a separate notice of appeal, this Court does not have jurisdiction over his objections to the grant of attorneys fees. See Farley v. Henderson, 883 F.2d 709, 712 (9th Cir.1989) (per curiam). Accordingly, we dismiss this aspect of Epstein's appeal.

AFFIRMED IN PART, DISMISSED IN PART.

FIRST AMENDED COMPLAINT[18]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD EPSTEIN	) Case No:CV 95-8489 R
	)
Plaintiff,	) FIRST AMENDED
	) COMPLAINT FOR
vs.	) DAMAGES etc.
	)
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, et al.	) [FILED 1/9/96]
	)
Defendants	)
	)

COMES NOW PLAINTIFF RICHARD EPSTEIN (hereinafter "PLAINTIFF"), and for his cause of action against DEFENDANTS and each of them alleges as follows:

1. PLAINTIFF is now, and has at all times herein mentioned been a resident of the County of Los

---

[18]. The complaint included in this appendix has been downloaded from the original disc, and included for reference. In order to accommodate inclusion in this, appendix the caption has been abbreviated and line references deleted. The text of the complaint, however, is included verbatim without editing.

Angeles, State of California of the Jewish faith, over the age of forty, and each of the events set forth herein took place within said County and State.

2. PLAINTIFF is informed, and based upon such information believes that DEFENDANT SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP (hereinafter referred to as "THE MEDICAL GROUP") is now, and was a business entity, whose form is unknown, doing business within the County of Los Angeles, State of California under the business name of KAISER PERMANENTE in conjunction with the other business entities named as DEFENDANTS in this action.

3. PLAINTIFF is informed, and based upon such information believes that THE MEDICAL GROUP did, prior to the happening of each of the events described herein, employ the services of PLAINTIFF RICHARD EPSTEIN, in connection with its conduct of a business within the State of California for the joint benefit of a group of related and controlled entities which has at all times herein mentioned included DEFENDANT KAISER FOUNDATION HOSPITALS, a non profit Corporation (hereinafter "KAISER FOUNDATION") and KAISER FOUNDATION HEALTH PLAN, INC., a corporation authorized and doing business within the State of California, County of Los Angeles (hereinafter "THE HEALTH PLAN").

4. PLAINTIFF is informed, and based upon such information believes that DEFENDANTS SHARON BUTTERFIELD, PAM CARTER, CATHY COUSINEAU, and RAMAH BALIBAR were residents of the County of

Los Angeles, State of California and employed by THE MEDICAL GROUP, KAISER FOUNDATION, THE HEALTH PLAN and various other related and controlled entities in supervisorial and management capacity.

5. PLAINTIFF is ignorant of the true names and capacities of DEFENDANTS sued herein as DOES 1 through 20, inclusive, and therefore sues these DEFENDANTS by such fictitious names. PLAINTIFF will pray leave of this court to amend this complaint to allege the true names and capacities when ascertained.

6. PLAINTIFF is informed and believes, and thereon alleges, that each of the DEFENDANTS herein was, at all times relevant to this action, the agent, employee, representing partner, or joint venturer of the remaining DEFENDANTS and was acting within the course and scope of that relationship. PLAINTIFF is further informed and believes, and thereon alleges, that each of the DEFENDANTS herein gave consent to, ratified, and authorized the acts alleged herein to each of the remaining DEFENDANTS.

7. The claims which are the subject matter of this action arise solely, and exclusively under the laws and constitution of the State of California, as set forth in Article I § 1 of the Constitution of the State of California and the California Fair Employment Act (California Government Code §§ 12900 et seq., hereinafter referred to as "FEHA").

8. Under the provisions of Government Code § 12940(a) it is illegal for any employer within the State

of California:

> . . . because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to . . . discriminate against the person in compensation or in terms, conditions or privileges of employment.

9. Under California Government Code § 12940(f) it is an unlawful employment practice for an employer to discriminate against any person because the person has opposed any practice prohibited under FEHA.

10. Under the provisions of Government Code § 12940(h) it is illegal any employer, training program or any other person within the State of California:

> . . . because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant . . . if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.

11. Under the provisions of California Government Code § 12940(i) DEFENDANTS, and each of them were at all times herein mentioned obligated to:

> . . . take all reasonable steps necessary to prevent discrimination and harassment from occurring.

12. Under California Government Code § 12941(a) it is an unlawful employment practice for an

employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40.

13. PLAINTIFF seeks no relief under the laws or statutes of the UNITED STATES OF AMERICA, and exclusive jurisdiction over the claims set forth herein is in the Courts established under the Constitution and laws of the State of California.

FIRST CAUSE OF ACTION

FOR DAMAGES UNDER CALIFORNIA GOVERNMENT CODE § 12965(b)

AGAINST ALL DEFENDANTS FOR DISCRIMINATION IN VIOLATION

OF CALIFORNIA GOVERNMENT CODE §§ 12940 & 12941

14. Plaintiff incorporates by this reference the allegations contained in paragraphs 1 through 13 inclusive from above, and by this reference make them a part hereof.

15. PLAINTIFF had been employed by THE MEDICAL GROUP, KAISER FOUNDATION, THE HEALTH PLAN and their related entities on May 22, 1979 and was employed by said entities on November 10, 1994 (the date of his wrongful termination) in the position of Senior Ortho Technician at a facility owned, managed, and operated jointly by said DEFENDANTS.

16. PLAINTIFF is informed, and based upon such information believes that during the one year prior to his termination on November 10, 1994 the individual DEFENDANTS, in their managerial and supervisorial capacity as agents of THE MEDICAL GROUP, KAISER FOUNDATION, THE HEALTH PLAN promoted, and encouraged the maintenance of a

hostile working environment in violation of California Government Code §§ 12940(h) and 12941 in which PLAINTIFF was subjected to ongoing harassment and ultimately terminated as an employee because of the fact that he was a member of the Jewish faith over the age of forty (40) years of age.

17. PLAINTIFF is informed, and based upon such information believes that the acts of harassment complained of herein were part of a conscious effort by one or more of his supervisors to eliminate both persons of the Jewish faith and persons over the age of forty (40) years of age from the working environment maintained by Defendants, as evidenced by the dramatic reduction in the number of persons of the Jewish faith and over the age of forty (40) years of age from the working environment maintained by THE MEDICAL GROUP, KAISER FOUNDATION, and THE HEALTH PLAN since approximately 1989.

18. PLAINTIFF is informed, and based upon such information believes that despite the fact that PLAINTIFFS had brought DEFENDANTS' bias, and the facts concerning the hostile working environment which he was being forced to endure to the attention of managing agents of THE MEDICAL GROUP, KAISER FOUNDATION, and THE HEALTH PLAN during the one year prior to his termination, none of the DEFENDANTS named herein, in violation of California Government Code § 12940(i) failed to take any action to remedy the hostile environment, which continued until the PLAINTIFF'S wrongful termination on November 10, 1994.

19. PLAINTIFF is informed, and based upon such information believes that the termination of his employment in November of 1994 was caused, in whole or part, as a result of his complaints of harassment and discrimination in violation of California Government Code § 12940(f) during the year preceding his termination.

20. PLAINTIFF is informed, and based upon such information believes that as a direct, and proximate result of the violation of California Government Code §§ 12940(f), 12940(h), 12940(i) and 12941 by the DEFENDANTS he has been denied various economic benefits, including but not limited to the right to continued employment from and after November 10, 1994. The exact amount of such damages are currently unknown, but will be shown by evidence to be produced at the time of the trial of the within action.

21. As a proximate result of DEFENDANTS' conduct PLAINTIFF has also suffered additional harm in the form of general damages resulting from the subsequent mental anguish caused by the hostile environment in which he was forced to work during the one year preceding November 10, 1994 and his subsequent termination on November 10, 1994.

22. As a result of the foregoing on or about October 17, 1995 PLAINTIFF caused the charges of discrimination (a copies of which are attached hereto as Exhibits "A", "B" and "C") to be filed with the California Department of Fair Employment & Housing, which issued its notices of PLAINTIFF'S right to sue

on November 6, 1995 (a copies of which are attached hereto as Exhibit "D", "E" & "F").

23. The actions of DEFENDANTS, as set forth above, were done with malice, fraud, or oppression, and in reckless disregard of the PLAINTIFF'S rights under the laws and constitution of the State of California, entitling PLAINTIFF to recover punitive or exemplary damages in such an amount in excess of $ 1,000,000.00 as the trier of fact in this action may deem appropriate.

24. This action has been commenced, and is being pursued by PLAINTIFF under the provisions of California Government Code § 12965(b).

25. As a result of the foregoing PLAINTIFF is entitled to recover an amount equal to all damages shown by proof at the time of trial plus reasonable attorney fees and costs incurred in pursuing his claims in this action.

SECOND CAUSE OF ACTION

FOR BREACH OF PLAINTIFF'S RIGHTS UNDER

THE COMMON LAW AND CONSTITUTION OF THE STATE OF CALIFORNIA

AGAINST ALL DEFENDANTS

26. Plaintiff incorporates by this reference the allegations contained in paragraphs 1 through 25 inclusive from above, and by this reference make them a part hereof.

27. Under California Civil Code § 1708 DEFENDANTS, and each of them were obligated to abstain from:

> . . . injuring the person or property of another, or infringing upon any of his rights.

28. Under ARTICLE I § 1 of the Constitution of the State of California PLAINTIFF was possessed of certain inalienable rights, which include each of the following rights:

> . . . enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

29. PLAINTIFF is informed, and based upon such information believe that in the three years prior to the commencement of this action, individual defendants acting in their capacity as managing and supervising agents of THE MEDICAL GROUP, KAISER FOUNDATION, THE HEALTH PLAN and certain other related entities, engaged in a course of conduct in violation of California Civil Code § 1708 intended to deprive PLAINTIFF of his inalienable rights under ARTICLE I § 1 of the Constitution of the State of California, including his right to continued employment and ability to earn an income regardless of his age or religion.

30. As a proximate result of DEFENDANTS' conduct PLAINTIFF has general damages resulting from the mental anguish and stress caused by their attempts to deprive him of his rights and privileges under the laws and constitution of the State of California. The amount of such damages exceeds the jurisdictional threshold of the Superior Courts established under the laws and constitution of the State of California.

31. The actions of DEFENDANTS, as set forth

above, were done with malice, fraud, or oppression, and in reckless disregard of the PLAINTIFF'S rights under the laws and constitution of the State of California entitling PLAINTIFF to recover punitive or exemplary damages in such an amount in excess of $1,000,000.00 as the trier of fact in this action may deem appropriate.

WHEREFORE, PLAINTIFF prays judgment against DEFENDANTS, and each of them, as follows:

1. For general damages, in an amount in excess of the threshold for this Court's jurisdiction, according to proof;

2. For compensatory damages according to proof, including lost earnings (past and future) and other employee benefits;

3. For special damages in a sum be determined at the time of trial herein;

5. For punitive damages in an amount appropriate to punish DEFENDANTS and deter others from engaging in similar misconduct;

6. For reasonable attorney's fees incurred by PLAINTIFF pursuant to California Government Code § 12965(b);

7. For costs of suit incurred by PLAINTIFF; and

8. For such other and further relief as the court deems proper.

LAW OFFICES OF ZAMOS & OKOJIE

By: /s/ Jerome Zamos
Jerome Zamos, Attorneys for
RICHARD EPSTEIN

THE ORDER DENYING REMAND
FILED ON FEB. 7, 1996 &
ENTERED FEB. 12, 1996[19]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD EPSTEIN	) Case No:CV 95-8489 R
	)
Plaintiff,	)
	)
vs.	)
	)
SOUTHERN CALIFORNIA	)
PERMANENTE MEDICAL	)
GROUP, et al.	)
	)
Defendants	)
_____	)

ORDER

The motion of plaintiff for order remanding this action came on for hearing before this Court, Jerome Zamos appearing for plaintiff and moving party, and F.

---

[19]. The order denying remand, filed on February 7, 1996 has been optically scanned, and downloaded into the appendix without modification (other than the deletion of line references). The face sheet and caption have not been included.

Scott Page appearing for defendants and opposing parties Southern California Permanente Medical Group, Sharon Butterfield, Pam Carter, Cathy Cousineau, and Ramah Baliber. Having considered all of the supporting and opposing papers submitted by the parties in connection with plaintiff's motion to remand this action, and having heard and considered the arguments of counsel at the hearing held in this Court on February 5, 1996, IT IS HEREBY ORDERED that plaintiff's motion to remand is denied.

DATED: Feb. 7, 1996

/S/ MANUEL L. REAL
HONORABLE MANUEL L. REAL

ORDER GRANTING IN PART, DENYING IN PART DEFENDANTS' MOTION TO DISMISS FILED MAR. 26, 1996 & ENTERED MAR. 27, 1996[20]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD EPSTEIN	) Case No:CV 95-8489 R
	)
Plaintiff,	)
	)
vs.	)
	)
SOUTHERN CALIFORNIA	)
PERMANENTE MEDICAL	)
GROUP, et al.	)
	)
Defendants	)
_____	)

ORDER

The motion to dismiss by defendants in this action, filed pursuant to Federal Rule of Civil Procedure 12 (b)(6), came on regularly for hearing before this Court

---

[20] The order on RESPONDENTS' motion to dismiss filed on March 26, 1996 and entered on March 27, 1996 has been optically scanned, and downloaded into the appendix without modification (other than the deletion of line references and the caption).

at the time and place noted above, F. Scott Page and Valerie Stidman appearing for defendants and moving parties, the Southern California Permanente Medical Group, Sharon Butterfield, Pam Carter, Cathy Cousineau, and Ramah Baliber; Jerome Zamos and Odion Okojie appearing for plaintiff and opposing party. Having considered all of the supporting and opposing papers submitted by the parties in connection with defendants' motion to dismiss, and the matter having been submitted by counsel,

IT IS HEREBY ORDERED that defendants' (1) motion to dismiss the individual defendants from the complaint and (2) motion to dismiss the second cause of action in its entirety, is GRANTED.

IT IS ALSO HEREBY ORDERED that defendants, motion to dismiss, to the extent it sought to limit the one remaining claim for relief against defendant the Southern California Permanente Medical Group to a claim for discrimination on the basis of age and religion only, is DENIED.

DATED: Mar. 26 1996

MANUEL L. REAL

HONORABLE MANUEL L. REAL

JUDGMENT ON RESPONDENTS' MOTION TO DISMISS FILED ON APR. 4, 1996 & ENTERED ON APR. 8, 1996[21]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD EPSTEIN	) Case No:CV 95-8489 R
	)
Plaintiff,	)
	)
vs.	)
	)
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, et al.	)
	)
Defendants	)
	)

Defendants' Motion to Dismiss the individual defendants Baliber and Cousineau from the first cause of action and to dismiss the second cause of action in

---

[21] The Judgment on RESPONDENTS' motion to dismiss filed on April 4, 1996 and entered on April 8, 1996 has been optically scanned, and downloaded into the appendix without modification (other than the deletion of line references and the caption).

its entirety pursuant to Federal Rules of Civil Procedure 12(b)(6) came on for hearing before this Court on March 25, 1996, the Honorable Manuel L. Real, District Court Judge presiding, and the Court, having considered the Motion to Dismiss, all exhibits and memoranda, filed, and oral arguments made, in support and in opposition to the Motion to Dismiss, and the matters having been submitted.

IT IS HEREBY ORDERED AND ADJUDGED that the individual Defendants to this action, Sharon Butterfield, Pam Carter, Cathy Cousineau and Ramah Baliber, be dismissed from this action with prejudice, and that Defendants, Sharon Butterfield, Pam Carter, Cathy Cousineau and Ramah Baliber recover their costs in the amount of $_____.

DATED: Apr -4 1996

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE
HONORABLE MANUEL L. REAL

SUMMARY JUDGMENT
FILED SEPT. 25, 1996 &
ENTERED SEPT. 26. 1996 [22]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD EPSTEIN	) Case No:CV 95-8489 R
	)
Plaintiff,	)
	)
vs.	)
	)
SOUTHERN CALIFORNIA	)
PERMANENTE MEDICAL	)
GROUP, et al.	)
	)
Defendants	)
	)

This action came on for hearing before this Court on September 16. 1996, the Honorable Manuel L. Real, District Court Judge presiding, on a Motion for Summary Judgment, and the evidence presented having been fully considered, the issues having been

---

[22] The Summary Judgment on September 25, 1996 and entered on September 26, 1996 has been optically scanned, and downloaded into the appendix without modification (other than the deletion of line references and the caption).

duly heard and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiff, Richard Epstein, take nothing, that the action be dismissed on the merits, and that judgment be entered in favor of Defendant Southern California Permanente Medical Group (as well aa Defendants Sharon Butterfield, Pam Carter. Cathy Couaineau, and Ramah Baliber based on the order of Dismissal entered March 27, 1996 and the judgment filed on April 4, 1996) and that these Defendants recover their costs in the amount of $ _____.

DATED: Sep 25 1996

/s/ MANUEL L. REAL

UNITED STATES DISTRICT COURT JUDGE

NOTICE OF APPEAL FROM JUDGMENTS AND ALL OTHER ORDERS ENTERED IN THIS ACTION INCLUDING THE COURT'S IMPROPER RETENTION OF JURISDICTION FOLLOWING MOTION TO REMAND FILED OCTOBER 15, 1996 [23]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD EPSTEIN	) Case No:CV 95-8489 R
	)
Plaintiff,	)
	)
vs.	)
	)
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, et al.	)
	)
Defendants	)
	)

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and all parties who have appeared

---

[23] The NOTICE OF APPEAL filed with the Clerk of the District Court on October 15, 1996 has been optically scanned, and downloaded into the appendix without modification (other than the deletion of line references and the caption).

in the above referenced action and their counsel of record:

NOTICE IS HEREBY GIVEN pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure that PLAINTIFF RICHARD EPSTEIN hereby appeals to the Ninth Circuit from the final judgments entered by the district court in favor of all the DEFENDANTS and the Court's improper retention of jurisdiction.

Copies the judgment entered in this case on September 26, 1996 and April 8, 1996 are attached hereto, and are subject to this appeal along with the previously entered interlocutory orders and decisions of the Court, including the order of the order entered herein on February 12, 1996 in which the Court denied Appellant's motion remand this action to The Superior Court of the State of California, for the County of Los Angeles, its order dismissing Plaintiff's claims against the individual Defendants designated herein, and all other actions, orders or process issued by this Court issued after the improper removal of this action from the Superior Court of the State of California for the County of Los Angeles.

Dated: October 14, 1996

LAW OFFICES OF ZAMOS & OKOJIE

By: /s/ Jerome Zamos
Jerome Zamos, Attorneys for
RICHARD EPSTEIN

ORDER GRANTING SCPMG'S MOTION FOR ATTORNEY FEES - FIRST ORDER FILED NOV. 18, 1996 ENTERED NOV. 19, 1996 [24]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD EPSTEIN	) Case No:CV 95-8489 R
	)
Plaintiff,	)
	)
vs.	)
	)
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, et al.	)
	)
Defendants	)
	)

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

On November 18, 1996, at 10:00 a.m. in the

---

[24] The attorney fee filed on November 18, 1996 and entered on November 19, 1996 has been optically scanned, and downloaded into the appendix without modification (other than the deletion of line references and the caption).

above-entitled Court, located at 312 North Spring Street, Los Angeles, California, the Motion for Attorney Fees against Plaintiff of Defendant Southern California Medical Group ("SCPMG") came on for hearing. Present at the hearing were Seyfarth, Shaw, Fairweather & Geraldson, counsel for SCPMG and Jerome Zamos, counsel for Plaintiff. Presiding at the hearing was the Honorable Manuel L. Real.

Having considered all of the papers and evidence, and being fully informed,

IT IS HEREBY ORDERED that SCPMG's Motion for Attorney Fees is granted, and that Plaintiff and his attorney are hereby ordered to pay to SCPMG attorney fees and expenses in the amount of $62,185.75. This Order is based upon the following findings:

1. SCPMG is entitled to attorney fees and expenses pursuant to California Government Code, section 12965(b) against Plaintiff because Plaintiff's suit was frivolous, unreasonable, meritless, and/or vexatious.

2. The amount of attorney fees and expenses granted is reasonable in light of the "lode star" calculation, the factors identified in Jordan v. Multonmah, 815 F.2d 1258, 1262 (9th Cir. 1987), and the declaration of F. Scott Page and the survey of attorney hourly rates attached thereto.

DATED: Nov 18 1996

/s/ MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

ORDER GRANTING SCPMG'S MOTION FOR ATTORNEY FEES - SECOND ORDER FILED NOV. 26, 1996 ENTERED NOV. 27, 1996 [25]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD EPSTEIN	) Case No:CV 95-8489 R
	)
Plaintiff,	)
	)
vs.	)
	)
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, et al.	)
	)
Defendants	)
	)

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

On November 18, 1996, at 10:00 a.m. in the above

---

[25] The attorney fee filed on November 26, 1996 and entered on November 27, 1996 has been optically scanned, and downloaded into the appendix without modification (other than the deletion of line references and the caption).

entitled Court, located at 312 North Spring Street, Los Angeles, California, the Motion for Attorney Fees against Plaintiff of Defendant Southern California Permanente Medical Group (~SCPMG") came on for hearing. Present at the hearing were James Breslo of Seyfarth, Shaw, Fairweather & Geraldson, counsel for SCPMG, and Jerome Zamos, counsel for Plaintiff. Presiding at the hearing was the honorable Manuel L. Real.

Having considered all of the papers and evidence, and being fully informed,

IT IS HEREBY ORDERED that SCPMG's Motion for Attorney Fees is granted, and that Plaintiff and his attorney are hereby ordered to pay to SCPMG attorney fees and expenses in the amount of $62,185.75. Plaintiff and Plaintiff's counsel, Jerome Zamos, shall be responsible jointly and severally for that amount. This Order is based upon the following findings of fact and law:

1. Attorney fees are allowable as costs to a prevailing party under the California Fair Employment and Housing Act, Cal. Gov't Code, section 12965(b). Attorney fees are to be awarded to successful defendants in cases under the FEHA where the plaintiff's claim is found to be "frivolous, unreasonable, or without foundation."

2. SCPMG is entitled to attorney fees and expenses pursuant to Section 12965(b) against Plaintiff because Plaintiff's suit was frivolous, unreasonable, meritless, and/or vexatious for the following reasons:

a. SCPMG's decision to terminate Plaintiff was supported by undisputed evidence. SCPMG presented overwhelming evidence of poor performance spanning

Plaintiff's entire employment with SCPMG, none of which Plaintiff disputed. Further, SCPMG presented evidence of three patient complaints received within a six month period in 1994 that resulted in his termination. Plaintiff did not dispute that the complaints were received, and that, in each occasion, at least some aspect of his treatment of the patient was inappropriate.

b. Plaintiff also had no evidence of religious or age discrimination. He did not dispute that his supervisor, Sharon Butterfield, whom he accused of age and religious discrimination, never once made a derogatory comment about his religion, and never once said anything that would lead him to believe that his age was a factor in his termination. Plaintiff also left undisputed the following facts:

-Plaintiff is not aware of any Jewish employee Butterfield has terminated (besides himself), demoted, or denied a promotion. (Pl. Resp. to Fact Nos. 117, 118).

-Besides Butterfield, the only employees Plaintiff considered anti Jewish were Barbara Moore and Doug Campbell. (Resp. to Fact No. 97).

-Plaintiff never heard Moore say anything he considered anti-Jewish, or even expressing a view with which he disagreed, and he dined with her 40-50 times. (Resp. to Fact Nos. 101, 102).

-Plaintiff "binded" with Campbell and considers him a friend. (Resp. to Fact Nos. 104, 105).

-Plaintiff does not contend that Cathy Cousineau, Ramah Baliber (who is Jewish), or Pam Carter, all of whom participated in the decision to termination Plaintiff, are anti-Jewish. (Resp. to Fact Nos. 150, 151,

152).

Plaintiff himself admitted that he believes there were "multiple reasons" for his termination, not just age and religion discrimination (Resp. to Fact Nos. 88, 89), and that the "chief reason" Butterfield wanted to get rid of him was because of his complaints regarding her management style to Butterfield's supervisor! (Fact No. 90 and response thereto).

Regarding Plaintiff's FEHA retaliation claim, he admitted at his deposition, and admitted in response to the Uncontroverted Fact setting forth that testimony, that he never complained about age or religion discrimination or harassment. (Fact No. 142 and Response thereto). Thus, his claim of retaliation was obviously frivolous.

3. The amount of attorney fees and expenses granted is reasonable in light of the "lode star" calculation, the factors identified in Jordan v. Multonmah, 815 F.2d 1258, 1262 (9th Cir. 1987), and the declaration of F. Scott Page and the survey of attorney hourly rates attached thereto. The fees are summarized as follows:

Attorney	# Hrs.	Rate	Total
F Scott Page	83 75	$190	$15,912.50
J. Breslo	233.25	$150	$34,987.50
V. Stidman	28.00	$ 85	$ 2,380.00
V. Stidman	58.75	$120	$ 7,050 00
J. Goodness	24.75	$ 75	$ 1,856.25
Total	428.50		$62,185.75

The evidence shows that these hours were spent on the following legal services provided in connection with this action:

– answer to complaint

– removing the case to federal court on federal question grounds

– opposing Plaintiff's Motion to Remand

– bringing a successful Motion to Dismiss as to the individual defendants

– serving Motion for Rule 11 Sanctions based on Plaintiff's failure to dismiss individual defendants preparing declaration of Non-compliance of opposing counsel regarding early meeting of counsel

– preparing declaration in response to Court's OSC regarding dismissal due to opposing counsel's non-compliance with Local Rule 6.1.

– propounding written discovery, including request for production of documents and interrogatories

– responding to written discovery from Plaintiff, including interrogatories and document requests

– preparing for and attending Rule 6 meeting and preparing joint report

– taking depositions, including two days of Plaintiff's deposition

– defending deposition of Dr. Craig Harwin preparing declaration, stipulation, and proposed order for continuance of pre-trial and trial dates..

– bringing a successful Motion for Summary Judgment as to each of Plaintiff's claims; preparing and filing Reply Brief regarding Plaintiff's failure to file Opposition; preparing and filing Reply to Plaintiff's Opposition; attending hearing.

– preparing various pre trial documents, including Memorandum of Contentions of Law and Fact, Witness list

– conferring with Plaintiff regarding pre-trial conference order

preparing and filing bill of costs.

preparing and filing Motion for Attorney Fees. (Page Decl. ¶ 7)

Each of the above services was necessary to providing a competent defense of SCPMG.

As set forth in the declaration of F. Scott Page and the Los Angeles market survey attached thereto, the requested rates are consistent with the prevailing rates of attorneys in the same geographical area with similar skills and experience. (Page Decl., ¶¶ 8-10, Ex. B). The hourly rates sought by SCPMG are also reasonable light of their attorneys' normal billing practices, their years of experience in employment discrimination litigation in particular, and the consistency of their rates with those of their peers with comparable experience in the Los Angeles legal community. (Page Decl., ¶¶ 8-10, Ex B).

DATED: Nov 18 1996

/s/ MANUEL L. REAL

UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN PETITION

ARTICLE III §§ 1 & 2 OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. Clause 1.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;–to all cases affecting ambassadors, other public ministers and consuls;–to all cases of admiralty and maritime jurisdiction;–to controversies to which the United States shall be a party;–to controversies between two or more states;–between a state and citizens of another state;–between citizens of different states;–between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens

thereof, and foreign states, citizens or subjects.

The Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

PROVISIONS OF THE UNITED STATES CODE

28 U.S.C. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of

just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

29 U.S.C § 185 (LMRA § 301)

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal

process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

42 U.S.C. § 2000e-5(c)

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement

of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4

Rule 4. Appeal as of Right–When Taken

(a) Appeal in a Civil Case.–

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs

later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeal in a Criminal Case.--In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order--but before entry of the judgment or order--is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,–

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions

therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) **How Initiated.**

(A) **By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim,

defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded

against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) **Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) **Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Rule 15(a)

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall

plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 54

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no

later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

Rule 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a

motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 58

Subject to the provisions of Rule 54(b): (1) upon a general

verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Local Rules for the Central District of California

Rule 16.10

Any motion or application for attorney's fees shall be served and filed within thirty (30) days after the entry of judgment or other final order, unless otherwise ordered by the Court. Such motions and their disposition shall be

governed by Local Rule 7.[26]

CALIFORNIA GOVERNMENT CODE SECTIONS

Government Code § 12940

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the

---

[26] Rule 16.10 has since been amended (as of April 1, 1998) reducing the period for filing attorney fee motions to 14 days to conform with Rule 54(d)(2) of the Federal Rules of Civil Procedure.

refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate

in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex, or any intent to make that limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position

the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code, which prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(h) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee

or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) This subdivision is declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) (A)For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

(4) For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section 12926.

(5) Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on

the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(l) Initial application of this section to discrimination by employers on the basis of mental disability shall be in accordance with the following schedule:

(1) Commencing January 1, 1993, for employers with 25 or more employees, the state, and its municipalities and political subdivisions.

(2) Commencing July 26, 1994, for all other employers specified in paragraph (2) of the subdivision of Section 12926 that defines "employer."

(a) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation or persuasion, or in advance thereof if circumstances warrant, the director in his or her discretion may cause to be issued in the name of the department a written accusation. The accusation shall contain the name of the person, employer, labor organization or employment agency accused, which shall be known as the respondent, shall set forth the nature of the charges, shall be served upon the respondent together with a copy of the verified complaint, as amended, and shall require the respondent to answer the charges at a hearing. For any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, and accusation pursuant to Section 12961, an accusation shall be issued, if at all, within two years after the filing of the complaint. For all other complaints, an accusation shall be issued, if at all, within one year after the filing of a complaint. If the director determines, pursuant to Section 12961, that a complaint investigated as a group or class complaint under Section 12961 is to be treated as a group or class complaint for purposes of conciliation and accusation as well, such determination shall be made and shall be communicated in writing within one year after the filing of the complaint to each person, employer, labor organization, employment agency, or public entity alleged in the complaint to have committed an unlawful practice.

(b) If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier

determines that no accusation will issue, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on his or her request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization or employment agency named in the verified complaint within one year from the date of that notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting AIDS/HIV discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice. The superior, municipal, and justice courts of the State of California shall have jurisdiction of those actions, and the aggrieved person may file in any of these courts. Such an action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties an action may be brought within the county of

defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department and of the commission. The remedy for failure to send a copy of a complaint is an order to do so. Those actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants. In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs except where such action is filed by a public agency or a public official, acting in an official capacity.

(c) (1) If an accusation or amended accusation includes a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or for both, the respondent may within 30 days after service of the accusation or amended accusation, elect to transfer the proceedings to a court in lieu of a hearing pursuant to subdivision (a) by serving a written notice to that effect on the department, the commissio n, and the person claiming to be aggrieved. The commission shall prescribe the form and manner of giving written notice.

(2) No later than 30 days after the completion of service of the notice of election pursuant to paragraph (1), the department shall dismiss the accusation and shall, either itself or, at its election,

through the Attorney General, file in the appropriate court an action in its own name on behalf of the person claiming to be aggrieved as the real party in interest. In this action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by his or her own counsel. Complaints filed pursuant to this section shall be filed in the appropriate superior, municipal, or justice court in any county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, or in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices. If the defendant is not found in any of these counties, the action may be brought within the county of the defendant's residence or principal office. Those actions shall be assigned to the court's delay reduction program, or otherwise given priority for disposition by the court in which the action is filed.

(3) A court may grant as relief in any action filed pursuant to this subdivision any relief a court is empowered to grant in a civil action brought pursuant to subdivision (b), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part.

(4) The department may amend an accusation to pray for either damages for emotional injury or for administrative fines, or both, provided that the amendment is made within 30 days of the issuance of the original accusation.

LETTER BRIEF TO NINTH CIRCUIT[27]

February 6, 1998

Cathy Catterson, Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Epstein v. Southern California Permanente Medical Group
Civil Appeal 96-56629 (USDC 95-8489 R)

Dear Ms. Catterson:

In accordance with the practice of this court and pursuant to Fed. R. App. P. 28(j), this is to advise the panel of additional citations relevant to the issues presented by the above-referenced case.

---

[27] The letter brief addressed to the Ninth Circuit following oral arguments is included [as set forth in footnote 9 at page 11 of the PETITION] in order to demonstrate the efforts by PETITIONER to alert the panel to the jurisdictional issue that was the principal basis for his appeal. The brief has been downloaded directly from the computer disc on which it was originally prepared for submission.

Initially it should be noted that the notice of appeal filed on October 15, 1996 (Tab 22 in Appellant's Excerpts of the record on appeal) stated, as set forth at page 2 lines 10 through 13 inclusive (Appellant's Excerpts page E 0610) that APPELLANT was appealing from;

> . . . all other actions, orders or process issued by [the district court] after the improper removal of this action from the Superior Court . . .

Because no answer was ever filed by DEFENDANTS/APPELLEES to any pleading other than the First Amended Complaint (which was filed as a matter of right under both state and federal law as pointed out page 11 of APPELLANT'S opening brief) the district court's jurisdiction under Article III of the Constitution of the United States of America was always based upon a pleading which contained no claims under federal law.

Under this Court holding in Harris v. Provident Life and Acc. Co. 26 F.3d. 930 (Ninth Circuit 1994) (cited at page 7 of APPELLANT'S REPLY BRIEF), and as set forth in APPELLANT'S rebuttal during oral arguments, the district court's jurisdiction is determined by the status of the pleadings at the time it enters its orders because an amended complaint relates back to the original filing. As a result of the foregoing, in the pending case the only pleading that was operative when all of the orders and judgments of the district court were entered did not provide a basis for federal jurisdiction under Article III of the Constitution of the United States of America.

During the course of oral arguments on February 5, 1998 the panel raised several questions concerning the impact of the Circuit's prior decision in Felton v. Unisource Corporation 940 F.2d. 503 (9th Cir. 1991) on Appellant's right to contest the District Court's failure to remand in the absence of an interlocutory appeal. The issue appears to be controlled by the subsequent decision of the United States Supreme Court in Caterpillar Inc. v. Lewis ___ U.S. ___, 117 S.Ct. 467 (December 10, 1996) in which the Court held at 117 S.Ct. 475:

> An order denying a motion to remand, "standing alone," is "[o]bviously ... not final and [immediately] appealable" as of right. Chicago, R.I. & P.R. Co. v. Stude, 346 U.S. 574, 578, 74 S.Ct. 290, 293, 98 L.Ed. 317 (1954). Nor is a plaintiff required to seek permission to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) in order to avoid waiving whatever ultimate appeal right he may have.

The position taken by the Supreme Court regarding a plaintiff's waiver of his appeal rights following a District Court's failure to remand, as set forth in Caterpillar Inc. v. Lewis supra was recognized by this Circuit in its recent decision in Associated Builders & Contractors, Inc. v. Local 302 109 F.3d. 1353, 1355 FN 4 (Ninth Circuit March 27, 1997 as amended May 12, 1997) which was decided after the submission of briefs in this case. In Associated Builders & Contractors, Inc. v. Local 302 the court observed that "[the appellant] was not required to seek interlocutory review of the denial of its motion to remand in order to

preserve the issue on appeal".

Based upon the foregoing, Felton v. Unisource Corporation supra is no longer good law, and cannot be relied upon in connection with the issues raised in the pending appeal because the position for which it is cited by APPELLEES has been rejected by the United States Supreme Court. The position set forth above is consistent with the arguments advanced by APPELLANT in point III at pages 6 through 8 inclusive of his reply brief filed herein, and during oral arguments in response to the panel's questioning.

Please distribute a copy of this letter to each panel member to whom this appeal has been assigned. Four originals and two copies are enclosed, together with a stamped envelope for return of a file stamped copy.

Thank you for your courtesy and cooperation in this matter.

Very truly yours,
/s/Jerome Zamos
JEROME ZAMOS

JZ:pc

cc:SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
F. SCOTT PAGE, Esquire
JAMES BRESLFORD, Esquire